APPEAL NO. 93098

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On December 10, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) maintaining an open record on the matter until January 6, 1993. He determined that respondent, claimant herein, has an impairment rating of 21%, based on a (date of injury), compensable injury. Appellant, carrier herein, asserts that it responded by mailing material during the time the record was open but the hearing officer did not consider it. Other than asking that the decision be vacated and the hearing reopened to consider its material, the carrier does not assert any other issue for consideration on appeal. Claimant responded, but his response was untimely and will not be considered.

DECISION

The decision is reversed and remanded for the reason specified hereafter.

The record indicates that claimant is 31 years old and injured his back on (date of injury), when he and another employee lifted a large pot of water while working as a steward for a hotel. Claimant testified that he had no prior back injuries or problems and had filed no workers' compensation claim previously.

Other than the reports of the designated doctor, (Dr. W), there was some evidence from three other doctors in the record. (Dr. H) stated in a TWCC-69 and accompanying report that claimant had a 50% impairment rating; a medical doctor (neurologist), (Dr. T), in a short statement said that he agreed with Dr. H as opposed to Dr. W. (Dr. Wh) reviewed claimant's medical records for the carrier and assessed a 9% impairment rating. In his report, Dr. Wh took issue with the CT scan of claimant's lumbar area as being misinterpreted. The claimant thought that the 50% impairment rate was appropriate, while the carrier's position was that Dr. W's impairment rating of 21% was in error. There was no issue other than impairment rating. (While not a matter on appeal, we note that the decision, under Discussion, says that Dr. W was an "agreed-to designated doctor." This statement does not track with Finding of Fact No. 3 that applies a standard of presumptive weight to the impairment rating. *See* Article 8308-4.26(d) of the 1989 Act.)

The hearing officer at the hearing referred to the carrier's exhibit E, which included carrier's letter dated November 20, 1992 to Dr. W, Dr. W's reply dated December 7, 1992 (which reduced the 21% to 14%), and an undated TWCC-69 from Dr. W showing an impairment rate of 14%. He pointed out that in Dr W's letter of December 7, 1992, the 1990 American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides) were referenced, not the 1989 AMA Guides, as set forth in the 1989 Act. The hearing officer then stated that he wished to write to Dr. W to assure use of the correct AMA Guides and correct standards. (*See* Texas Workers' Compensation Commission Appeal

No. 92595, decided December 21, 1992, which notes it is appropriate for the hearing officer to develop the facts regarding the designated doctor's report. *See also* Article 8308-6.34(b) of the 1989 Act which imposees a duty on the hearing officer to ensure "the full development of the facts . . .") Opportunity would then be given to each party to comment and reopen the evidence. He added that if nothing were received from the parties, he would close the record and write the opinion. The carrier asked about the time that would be allowed. After some discussion, the hearing officer said that he would give 10 days from the date of Dr. W's report. Thereafter, after closing arguments, the hearing officer announced that the record would be "closed 10 days after receipt of Dr. W's new TWCC form 69 which I will request by letter...." Neither at the time the hearing officer first mentioned that a letter would be written to the designated doctor, nor at the end of the hearing when he restated the time period that the record would remain open, did either party object to such a letter being written.

In the carrier's closing argument, counsel argued that Dr. W should have reviewed the CT scan himself, and not just relied upon the report of the doctor who performed it. Carrier referred to Dr. Wh who had said in his report, "[t]he CT scan of the lumbar spine was misinterpreted as a Grade II spondylolisthesis due to the wedge shape of the vertebral body visualized on planer slices." The hearing officer then mentioned that the carrier had written to Dr. W and could send a letter asking him to review the test himself. Carrier replied that it had asked him to do just that, but he did not respond to that request. (Dr. W's reply of December 7, 1992, in referring to the 1990 Guides, discusses "primary diagnosis" and, applying that concept, reduced his prior 21% to 14%--the phrasing of that letter may indicate that Dr. W considered his answer as responsive to the thrust of the carrier's letter.) The carrier agreed that Dr. W did not need to do each test himself, but said that he should interpret the results himself. The hearing officer then said that in his letter to Dr. W, he would ask him to provide a decision based on the correct standard after he reviewed all testing.

The hearing officer on December 11, 1992 (the day after the hearing) wrote to Dr W. A copy of his letter is in the record as Hearing Officer's Exhibit 2. This letter referred to a conversation the day before and said that a copy of an Appeals Panel decision was enclosed. He pointed out that the 1989 Guides must be used. He recited that in their conversation the previous day, Dr. W had said he did not review the CT film because it was reviewed by the radiologist--Dr. W is not a radiologist. The hearing officer further stated that he agreed that it was "reasonable not to substitute the opinion of a radiologist with the opinion of an orthopedic surgeon." He asked Dr. W to state, after applying the correct standard, whether the 21% or 14% is correct; he added that Dr. W could also reconsider and provide a new report. (We note that the Appeals Panel has no issue before it on appeal as to whether the designated doctor should have interpreted the film--the only issue raised on appeal is whether the record should be reopened.)

Dr. W replied to the hearing officer on December 15, 1992, in a short letter that was added to the record as Hearing Officer Exhibit 3. It is quoted as follows:

> In regards to your December 11 letter and to our phone conversation on December 10, the 1989 AMA Guidelines were used for evaluation of this patient's case. The sentence that was quoted to you was in the 1990 Guidelines which we had talked about. This sentence is not in the 1989 Guidelines, so on the basis of the 1989 Guidelines, the impairment rating should be the original rating of 21% in that the spondylolisthesis would be incorporated which is an 8% impairment rating. The 14% combined with the 8% equals 21% using the combined tables. This final rating is predicated on the 1989 AMA Guidelines evaluation for impairment.

While the hearing officer does not state whether copies of Dr. W's reply went directly to the other parties, Hearing Officer Exhibit 3 indicates no copies were sent by Dr. W to anyone other than the hearing officer. This exhibit indicates that it arrived at the Texas Workers' Compensation Commission (Commission) on December 23, 1992. The carrier's appeal recites, though, that it responded to the Commission on December 23, 1992, from which it may be inferred that the carrier received a copy of Dr. W's December 15th letter (the subject of its response) no later than December 23rd.

Ten days from December 23, 1992 is January 2, 1993, which is on a Saturday. Even when the time is carried forward to the following Monday, January 4th, that date is still two days short of the date the record was closed, January 6, 1993. The hearing officer made it clear at the end of the hearing that the record would close within a specified time after the reply of Dr. W was received. He had earlier made it clear that either party would have an opportunity to respond, and if none were received, he would make his decision without a party's comment. Tex. W. C. Comm'n, 28 Tex. Admin. Code § 102.3 (Rule 102.3) addresses time periods for filings and notices but restricts itself to those "required under this act." The 1989 Act does not require any filing in this instance. (*Also see* Rule 143.3 which specifically provides that a request is timely filed when mailed within 15 days and received within 20 days after the party received the hearing officer's decision.) As stated, the hearing officer did not set a date for filing a comment with him, he set a date upon which the record would be closed. We will not require that a hearing officer, while conducting a contested case hearing, must add a period for mailing time when announcing a time period after which the record will be closed.

Since the hearing officer stated the pivotal event to be the date when the record would close, we observe that such date was not easily defined in this instance. Closing the record "10 days after receipt of [the doctor's] new TWCC form 69" does not provide a clear understanding of the date the record will close. Perhaps a statement that "the record will

close on X date--any evidence, argument or request for more time based on your inability to respond must be received by this office no later than X date," would be appropriate. Another method to assure each party has an opportunity to respond in an instance such as this would be to schedule another hearing--by telephone perhaps--to receive comments and determine when additional evidence would be submitted.

The carrier's appeal does not assert that the hearing officer or even the commission received its comment on or before January 6, 1993. It only asserts that when the carrier received the hearing officer's decision (distributed on January 15, 1993), it then contacted the hearing officer and told him of its comment mailed on December 23rd. The carrier then states that the hearing officer "did investigate it and found that such document had been received however, he refused to reopen the case . . .." There is no assertion that the hearing officer indicated the date that the December 23rd comment reached the Commission, much less that it arrived on or before January 6, 1993. Nevertheless, the carrier does state in its appeal:

The carrier objects to the statement of the case as submitted by the Contested Case Hearing Officer in that it erroneously includes that '[n]o communication was received from the parties and the evidence was closed on January 6, 1993.'

We choose to infer from this statement, and the earlier reference to the hearing officer's discovery of a document at some time after January 15, 1993, that carrier does assert its submission reached the Commission no later than the day the record was closed, January 6, 1993.

The appeal, as stated, does no more than assert that the hearing officer would not reopen the record. The reopening of a record is a discretionary act. *See* City of San Antonio v. Dept. of Health, 738 S.W.2d 52 (Tex. App.-Austin 1987, writ denied). That case also commented that without such discretion, the ability to issue an order could be impaired by the "continued introduction of evidence." The standard for review is whether the agency abused its discretion. In this case, the hearing officer's refusal to reopen the record to consider a party's comments on a designated doctor's new report, if they were received by the respective field office within the time period specified for keeping the record open, would be an abuse of his discretion, notwithstanding that his decision had been made and distributed. *See also* Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993, in which we looked to see if both parties were given "fair opportunity to present evidence," in regard to the reopening of a record.

We reverse and remand for further consideration not inconsistent with this opinion and development of the evidence, as deemed necessary by the hearing officer, as to the date the carrier's submission was received by the field office. If it was received on or

before the date the record was closed, the hearing officer should consider it. Regardless of when carrier's submission was found to have been received, this reversal and remand necessitates issuance of a new decision. A party who wishes to appeal from the new decision must file a request for review not later than 15 days after the date the new decision is received, pursuant to Article 8308-6.41 of the 1989 Act.

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Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge